85-1259

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the defendant in a Government-instituted civil action in a Federal District Court to recover substantial civil penalties (in this case in excess of $300,000) under a federal statute is entitled under the Seventh Amendment of the Constitution to a trial by jury.

2. (a) Whether equitable estoppel runs against the Government.

(b) Whether equitable estoppel precludes the recovery of civil penalties by the Government under the Clean Water Act when a citizen requests a jurisdictional inspection by the agency charged with enforcement, is led to believe that the agency does not have jurisdiction and that a permit is not required, proceeds with his development of lots under constant surveillance by the agency, is never advised that his activities have come under the agency's jurisdiction or are otherwise unlawful notwithstanding regulations requiring the agency to so inform the citizen, and is then punished five years later after virtually all of the lots have been sold to others.

PARTIES

The defendant-appellant below was an individual, Edward Lunn Tull. The plaintiff-appellee was the United States.

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Petitioner Edward Lunn Tull respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 769 F.2d 182 and appears at Appendix ("App.") 1a. The opinion and judgment order of the District Court are unreported and appear at App. 30a and 64a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1985. A timely-filed petition for rehearing and suggestion for rehearing *en banc* was denied by a vote of six to five on October 30, 1985. App. 26a. On November 4, 1985, a revised Order denying the petition for rehearing and suggestion for rehearing *en banc* was entered, with four judges dissenting. App. 28a.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Seventh Amendment and relevant provisions of the Clean Water Act of 1977, 33 U.S.C. §§ 1251, *et seq.*, and implementing regulations promulgated by the United States Army Corps of Engineers are reprinted at App. 75a.

STATEMENT OF THE CASE

Petitioner ("Tull") is engaged in the business of developing residential properties on the island of Chincoteague, Virginia. In July of 1976, Tull obtained advice from his engineer and his attorney to insure that the proposed work would not encroach into the Corps of Engineers' jurisdiction. Joint Appendix filed in the Court of Appeals ("JA") 941. As an additional precaution, he requested a determination from the Corps itself—"to see if they had any objection to any work on any of the property there—any of the filling of the property." JA 951-952. Pursuant to his request, a jurisdictional inspection of these properties was conducted by the Corps' Norfolk District Engineer and his staff, which included the Chief of the Construction Operations Division, the Chief of the Regulatory Functions Branch, the Chief of the Waterways Inspection Branch, an employee of the

[1] The two sets of votes on rehearing differed in that Judge Warriner, sitting on the original panel by designation, was not counted when the second Order was entered.

Permits Branch, an employee of the Enforcement Division, and two Corps counsel. JA 663-670. The Corps counsel, whose duties included jurisdictional determinations (JA 663), confirmed that the express purpose of the inspection was to view the work ongoing at the sites in order to determine whether the activity was within the Corps' jurisdiction (JA 672) and was being carried on without a necessary permit. JA 709.[2] After being advised by the District Engineer that fill could not be placed at two locations, Tull proceeded with his plans as to the remaining properties (JA 518), but did not fill the areas where he was instructed that a permit would be required. JA 503-504, 719, 807, 838-839, 960, 962, 1383.

After the inspection, the Corps continued to monitor Tull's ongoing filling and construction activities by aerial inspections and photographs. JA 1142-46. These photographs demonstrated the progress of the work, which included pushing fill material into the Fowling Gut drainage ditch (JA 1261, 1262, 1373, 1427, 1439-42), construction of utilities and roads (JA 1371-72), and, ultimately, the sale of the properties to third parties and the placement of trailers on the lots. JA 1265-67, 1446. These improvements were made at substantial expense to Tull. JA 1382.

At no time during the five years between the inspection and the filing of the Complaint in this case did the District Engineer issue a cease and desist order or any other notification that Tull's filling activity was unau-

[2] The District Court conceded that the purpose of the inspection of "defendant's properties" was "to determine the 'Corps' jurisdiction' as to any filling activity to be conducted thereon." App. 37a.

At the time of this inspection, among the properties being filled was a drainage ditch later described in the District Court opinion as Fowling Gut Extended, for which there was no recorded easement. JA 1171-73, 1450. The Corps personnel had confirmed from prior aerial photographs that this ditch was being filled by Tull. JA 484-490, 1132-39.

thorized (JA 961-962), even though such notice is required by the Corps' regulations. 33 C.F.R. 209.120(g)(12) (1975) (App. 80a) and 33 C.F.R. 362.2 (1977) (App. 81a).[3] The first notice received by Tull was in the form of findings of violation and Orders for Compliance issued by the Environmental Protection Agency in December 1980 and January 1981, and these findings and Orders related to only a small segment of the property being filled.[4] JA 1242, 1247. Tull immediately stopped filling these properties (except for some oyster shells placed at the front face of the existing fill to ensure its stability), and he also sought clarification of the findings and Orders. JA 963-965, 1252, 1253-54.

This case began with the filing of a three-count complaint on July 1, 1981. The complaint alleged that Tull had filled wetlands adjacent to navigable waters, as defined by 33 C.F.R. 323.2(c), and that these wetlands were waters of the United States under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*[5]

Tull demanded a jury trial under the Seventh Amendment (JA 15), which was denied. JA 17.[6] Trial on the

[3] One letter from the Corps which Tull received in 1976 related to an operation that was never carried out. JA 710-712, 729-730. Another received in 1978 was merely a request to come onto certain property; because of a misunderstanding over which property the Corps was referring to, the matter was dropped after Tull's response. JA 976-982, 1862-64.

[4] Of the total penalty or fine of $325,000 ultimately imposed by the District Court, only $5,000 related to the properties alluded to in these findings and Orders.

[5] After the Complaint was filed, Tull was enjoined from further filling a property which was not the subject of the original Complaint. Tull immediately ceased filling this property. JA 985-986.

[6] The only reason that Federal Rule of Civil Procedure 38, which also guarantees the right to jury trial, was not pressed on the courts below is that, as the treatises make clear, the Rule is coextensive with the Seventh Amendment, neither adding nor detracting from the rights accorded by the Amendment. *See* J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice ¶ 38.07[1] (2d ed. 1985); C. Wright & A. Miller, Federal Practice and Procedure, § 2301 (1971 & Supp. 1985).

merits began in July 1982, with the court sitting without a jury. JA 17-18. After the Government rested and Tull sought a partial directed verdict, the Government moved to reopen and amend, which Motion the court granted (JA 579), and the Government's Second Amended Complaint was filed. JA 28-35. The Second Amended Complaint included an alleged violation of 33 U.S.C. § 403. App. 67a-74a.

The Judgment Order entered by the District Court ordered Tull to pay a "penalty or civil fine" under Section 1319(d) of the Clean Water Act in the total amount of $325,000.00. App. 64a-65a.[7] The District Court offered Tull the option of obtaining a suspension of $250,000 of the fine by restoring the drainage ditch to its original condition. App. 65a. The District Court refused to permit Tull to relocate the drainage ditch to an alternative location upon his Petition that restoration to its original condition was impossible because he had sold the land to third parties. JA 126-132. Additionally, the District Court ordered restoration of a portion of the land by removal of fill material. App. 65a.

Tull appealed. The Court of Appeals, in a two-to-one decision, affirmed, finding no merit to Tull's claim that he had a right to a jury trial. The court held that the Seventh Amendment right to a jury trial is limited to suits in the nature of an action existing at common law when the Amendment was adopted. App. 8a. The majority also rejected Tull's claim of equitable estoppel, holding that the District Court was not clearly erroneous in

[7] The District Court called $75,000 of this amount a "penalty or civil fine" and the remaining $250,000 a "fine," but since both penalties were imposed pursuant to the same section of the Clean Water Act, there was no legal distinction between them. *See* App. 59a.

finding that nothing the Government did or failed to do misled Tull. App. 10a.

Judge Warriner, dissenting, found error in the District Court's denial of Tull's demand for a jury trial. App. 19a-25a. He further found not only that Tull had relied upon the Corps of Engineers to his detriment, thereby invoking the doctrine of equitable estoppel (App. 13a-19a), but that the action of the Government representatives in this case "gives the appearance of lying in wait with a calculating eye for five years after first lulling him [Tull] into a reasonable view that his activities were acceptable; and after he invested time, money, and effort in completing what he thought to be suitable residential lots, the Corps with a bulging portfolio of evidence descended on him." App. 19a. Judge Warriner concluded that "the case at bar fits all the elements of equitable estoppel." App. 16a.

REASONS FOR GRANTING THE WRIT

The judges below were badly split in regard to the two questions presented in this Petition, with one judge dissenting on the panel and four judges in the Circuit voting to hear reargument *en banc*. This Court should grant certiorari to resolve these issues, one of which has caused a conflict in the Circuits and the other of which has been left unresolved by this Court's prior decisions.

1. Petitioner was entitled to a jury trial.

In this case the Government, pursuant to the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, sought civil penalties that could have exceeded $22 million.[8] Defendant Tull requested, but was denied, a jury trial. The trial court, sitting without a jury, imposed penalties of

[8] When the number of days alleged in the original Complaint to be possible days of violation is multiplied by the maximum civil penalty of $10,000 per day, the result is a possible total civil penalty of $22,890,000.

$325,000. App. 64a-65a.[9] As urged at each appropriate stage of this proceeding, the refusal to grant a jury trial violated Tull's Seventh Amendment rights.

In two cases during the early 1900s, this Court declared that in civil suits brought by the United States to recover penalties under the Alien Immigration Act, the defendants were entitled to jury trials. *Hepner* v. *United States*, 213 U.S. 103, 115 (1909); *United States* v. *Regan*, 232 U.S. 37, 47 (914).[10]

Confusion was introduced in 1937, however, when the Court discussed an NLRB order for both reinstatement and the payment of wages for time lost by a discharge. The Court stated that the Seventh Amendment preserved "the right which existed under the common law when the Amendment was adopted" but had "no application to cases where recovery of money damages is an incident to equitable relief * * *." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). As discussed *infra*, this language—to the extent that it implied that *only* those rights to a jury trial which existed at common law were entitled to Seventh Amendment protection—was later repudiated, but it nonetheless apparently confused the panel below. *See* App. 8a.

[9] Both the majority and dissent discussed the civil penalty imposed as $75,000, apparently because they believed that Tull could restore the Fowling Gut ditch to its prior condition and thus avoid $250,000 of the fine. Tull cannot restore the ditch, as it would require him to dig across property he had already sold to others prior to any Government action in this case. JA 126-132.

[10] The majority below declined to follow these decisions on the ground that the statements in them constituted merely *dicta*. App. 9a.

At about the same time that these two cases were decided, the Court held that the Seventh Amendment was not violated by transferring from the courts to a rental control commission actions to recover possession of real property. *Block* v. *Hirsh*, 256 U.S. 135, 158 (1921).

Almost ten years after *Jones & Laughlin Steel Corp.*, the Court decided a case that is relevant here even though it did not specifically discuss jury trials. *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), held that a court in equity had the power to order restitution of rents collected by a landlord in excess of the permissible maximum under Section 205(a) of the Emergency Price Control Act of 1942. The Court was careful to distinguish this restitution remedy from one for damages in the nature of penalties under Section 205(e) of the Act.[11] Such penalty actions, said the Court, would have to be brought in a court of law rather than in a court of equity. 328 U.S. at 401-402.

The restitution provisions applicable in the instant case, with their own penalty provisions (criminal), appear in the Rivers and Harbors Act, 33 U.S.C. § 406. These were *not* the penalties sought by the Government in this case. The $325,000 which Tull was ordered to pay was imposed not as restitution but as a civil penalty or fine under the Clean Water Act, 33 U.S.C. § 1319(d), similar to the Emergency Price Control Act dealt with in *Warner Holding Co.*

The Court squarely held in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), that the defendant was entitled to a jury trial, even though the original suit was brought solely for a declaratory judgment. In anticipation of a complaint seeking antitrust treble dam-

[11] As the Court explained: "Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e). * * * When the Administrator seeks restitution under § 205(a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205(e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant." 328 U.S. at 402.

ages, the prospective defendant brought suit and the prospective plaintiff counterclaimed, raising the same issues that would have been raised in the prospective plaintiff's original suit. The Court held that the prospective plaintiff could not be deprived of a jury trial simply because equitable relief had originally been sought by the prospective defendant. Similarly, in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), the Court held that in a breach of contract suit where the plaintiff sued for both an injunction and an accounting, the claim was one for a money judgment, was legal in nature, and therefore required a jury trial.[12] And in *Ross* v. *Bernhard*, 396 U.S. 531, 537-538 (1970), the Court held in a stockholders' derivative action that where equitable and legal claims are joined in the same action, the right to a jury trial on the legal claims cannot be infringed by trying the legal issues as incidental to the equitable ones.

It was in this context that *Curtis* v. *Loether*, 415 U.S. 189 (1974), was decided. The Court there held that either party was entitled by the Seventh Amendment to a jury trial in a suit for damages under the Civil Rights Act of 1968. The Court interpreted the language of *Jones & Laughlin Steel Corp.*, quoted above, to mean merely that the Seventh Amendment "is generally inapplicable in administrative proceedings" (*id.* at 194), but that "when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts," a jury trial must be available. *Id.* at 195. Even though the Civil Rights Act defined a new legal duty, the awarding of damages sounded basically in tort. *Id.* The Court went on to distinguish the *Warner Holding Co.* situation regarding reinstatement and backpay—although

[12] The Court held in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 333-337 (1979), that an equitable determination by a court can have collateral estoppel effect in a subsequent legal action without violating the Seventh Amendment. *See also Katchen* v. *Landy*, 382 U.S. 323, 339 (1966).

it refused to decide whether a jury trial would there be required. *Id.* at 196-197. It pointed out that there are substantial differences between restitution, involving a court's equitable jurisdiction, and damages. *Id.*[13]

In *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974), the Court held that the Seventh Amendment entitled either party to a trial by jury in a suit to recover the possession of real property, particularly since a similar right was protected at common law. But whether or not the statutory right established by Congress was a close equivalent of the common law right, the Seventh Amendment was applicable because "the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." *Id.* at 375. The Court interpreted *Block* v. *Hirsh*, *supra* n.10, merely to mean that the Amendment "is generally inapplicable in administrative proceedings." *Id.* at 383.

Finally, in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), the Court dealt with a statutory scheme whereby Congress gave to an administrative agency the right to impose civil penalties on an employer maintaining any unsafe working condition. The Court held that where the Government sues in its sovereign capacity to enforce "public rights" created by federal statutes, the Seventh Amendment does not "prohibit Congress from assigning the *fact-finding function* and *initial adjudication* to an administrative forum with which the jury would be incompati-

[13] Following *Loether*, the lower courts have recognized that "the Seventh Amendment clearly requires trial by jury even in actions unheard of at common law where they involve rights and remedies of the nature of those traditionally involved in an action at law (rather than in an action at equity or in admiralty)." *United States* v. *Dudley*, 739 F.2d 175, 178 (4th Cir. 1984). *See also Quinn* v. *Digiulian*, 739 F.2d 637, 645-647 (D.C. Cir. 1984), and cases there cited.

ble."[14] The Court stressed the importance of the *forum* where the factfinding takes place (*id.* at 458-61), and it again interpreted *Jones & Laughlin Steel Corp.* to mean that the Seventh Amendment is generally inapplicable to administrative proceedings. *Id.* at 454-455.[15]

Following *Atlas Roofing Co.*, the Courts of Appeals have denied jury trials in actions involving claims historically considered equitable in nature,[16] where Congress has assigned decision-making to private arbitration proceedings,[17] where the sole question relates to the enforcement of a decree in a class action,[18] and where an ad-

[14] *Id.* at 450 (footnote deleted; emphasis added). The Court declined to decide, and apparently reserved, the question necessarily presented in the instant case of whether the Seventh Amendment has no application to *all* Government litigation involving fines. *Id.* at 449 n.6. The Court further refined the "'public' right" concept, but without relation to jury trials, in *Thomas* v. *Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, 3337 (1985). *See also id.* at 3341-42 (Brennan, J., concurring).

[15] Because of the doctrine of sovereign immunity, the Court has also held that a jury trial is not required in suits against the United States. *Lehman* v. *Nakshian*, 453 U.S. 156 (1981); *Galloway* v. *United States*, 319 U.S. 372, 388-389 (1943).

[16] *Phillips* v. *Kaplus*, 764 F.2d 807, 813-814 (11th Cir. 1985) (accounting of a partnership); *see also Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 487 F. Supp. 999, 1001-08 (S.D.N.Y. 1980).

[17] *E.g.*, *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1124, 1131-32 (1st Cir. 1984) (Multiemployer Pension Plan Amendments Act); *Board of Trustees* v. *Thompson Building Materials, Inc.*, 749 F.2d 1396, 1404-06 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2116 (1985) (same); *Terson Co.* v. *Bakery Drivers & Salesmen Local 194*, 739 F.2d 118, 121 (3d Cir. 1984) (same); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F.2d 843, 854-855 (2d Cir.), *cert. denied*, 104 S.Ct. § 3554 (1984) (same).

[18] *In re Corrugated Container Antitrust Litigation*, 752 F.2d 137, 143-145 (5th Cir.), *cert. denied*, 105 S.Ct. 3536 (1985).

ministrative agency itself determines reparations claims.[19] None of these cases, of course, even remotely governs this one.

More to the point, the defendant in a penalty suit brought by the Federal Aviation Administration under the Federal Aviation Act, 49 U.S.C. § 4171(a)(1), which subjects any one who violates the Act to a civil fine not to exceed $1000 for each violation, has been accorded a jury trial even though the Act does not provide for one. *See FAA* v. *Landy*, 705 F.2d 624, 627, 635 (2d Cir.), *cert. denied*, 464 U.S. 895 (1983). The Tenth Circuit has refused to deny a jury trial in a suit by the United States for declaratory and injunctive relief and for the recovery of taxes. *United States* v. *New Mexico*, 642 F.2d 397, 402 (10th Cir. 1981). And alleged violations of the Bill of Rights of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 411, 529, have been held to be triable before a jury even though the claims were primarily equitable in nature. *Quinn* v. *DiGuilian*, 739 F.2d at 645-646.

However, the case that most closely resembles the instant one is *United States* v. *J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), and the decision below is squarely in conflict with Judge Friendly's careful and thorough analysis and decision for the Second Circuit in that case. There, the Federal Trade Commission asked the Attorney General to seek penalties against a company, pursuant to 15 U.S.C. § 45(1), for violation of a cease and desist order. In a lengthy opinion that dealt with all relevant cases, Judge Friendly concluded that the company was entitled to a jury trial.

He rejected the notion that the action was comparable to one seeking an order for civil contempt, which con-

[19] *Myron* v. *Hauser*, 673 F.2d 994, 1001-05 (8th Cir. 1982); *Rosenthal & Co.* v. *Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978). However, the courts have refused to by-pass jury trials where the action was for a statutory forfeiture. *E.g., United States* v. *One 1976 Mercedes Benz 280S*, 618 F.2d 453, 458-469 (7th Cir. 1980).

cededly did not entitle the defendant to a jury trial. 498 F.2d at 424-425. He pointed out that while Congress *could* have granted the Commission itself the power to impose penalties, subject to limited judicial review, it had not done so. *Id.* at 430. Pointing to numerous lower court decisions, he stated that "actions for statutory penalties have been held to entail a right to jury trial, even though the statute is silent, both where the amount of the penalty was fixed and where it was subject to the discretion of the court * * *." *Id.* at 423 (footnote deleted). He concluded: "if in authorizing a civil suit by the chief law officer of the Government, a procedure which had always been thought to entail a right of jury trial, Congress had wished to withhold it (assuming *arguendo* that it could), Congress would have said so in unmistakable terms and not left this as a secret to be discovered many years later." *Id.* at 424-425. Like the statute at issue in *J.B. Williams Co.*, the Clean Water Act contains not a word of legislative history indicating that Congress intended for proceedings under the Act to be governed solely by equitable, as opposed to common law, principles, or for a jury trial to be denied. *Cf. Curtis* v. *Loether*, 415 U.S. at 192. And where the statute is silent, the result is clear.

Professor Moore agrees with the reasoning of Judge Friendly. He flatly states that "there is a right of jury trial when the United States sues to collect taxes or to collect a penalty, even though the statute is silent on the right of jury trial." J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 38.31[1] at 38-235-38-236 (2d ed. 1985). *See also* C. Wright & A. Miller, *Federal Practice and Procedure*, § 2316 at 79 (1971 & Supp. 1985).

We recognize, of course, that this Court has retreated from the early formulation that the Seventh Amendment was meant to embrace "all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar

form which they may assume to settle legal rights." *Parsons* v. *Bedford*, 28 U.S. 433, 447 (1830). The Court has ruled that where Congress *both* creates the right to sue *and* establishes an administrative forum for the determination of that right, the Seventh Amendment does not apply because "the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved." *Atlas Roofing Co.*, 430 U.S. at 460-461. However, the Court has never held that where Congress creates the legal right but allows the remedy to be determined in an ordinary court of law, a jury trial can be denied. *Curtis* v. *Loether*, in fact, held to the contrary.

The Second Amended Complaint in this case, which appears at App. 67a-74a, leaves no doubt as to the nature of the action brought by the Government and the forum in which it was to be adjudicated. The Complaint was lodged in Federal District Court and alleged that "[t]his is a civil action" instituted to obtain injunctive relief and "the imposition of civil penalties." App. 67a. It charged that Section 309(d) of the Clean Water Act provides for "a civil penalty not to exceed $10,000 per day" for any one who violates the Act (App. 68a); it thereafter cited this Section three times as the source of the relief sought (paras. 12, 18, 24, App. 69a-71a); and it in fact asked the District Court to "assess[] civil penalties in the amount of $10,000 per day for each violation * * *." App. 72a. The Complaint also sought an injunction and an order directing Tull "to restore" the wetland areas (App. 72a), even though at the time of the Complaint he no longer owned almost all of the property. The Complaint was issued by the United States Attorney, an Assistant United States Attorney, and an attorney for the Land and Natural Resources Division of the Department of Justice. App. 72a-73a.

To say that this Complaint initiated an action in District Court that was equitable in nature would be a gross

perversion of the facts.[20] The penalties were not an adjunct of, or incidental to, equitable relief;[21] the so-called equitable relief was a catch-all remedy, almost wholly moot at the time of the action, which was incidental to the imposition of fines and penalties. If this action was sufficiently "equitable" to defeat a request for a jury, a jury trial can be thwarted in *any* action in any court for damages, fines, or penalties simply by the addition of a conclusory request for an injunction.

Moreover, regardless of whether the injunction was incidental to damages or vice versa, this is the wrong test. It is precisely the one rejected by this Court in *Dairy Queen*, where the District Court regarded the claim for a money judgment as "incidental" to the injunctive relief sought, and this Court held that under *Beacon Theatres*, entitlement to a jury trial "applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not." 369 U.S. at 473.

A suit for civil penalties is a legal action, in the nature of an action in debt, and not an equitable one.[22] And it is precisely this kind of legal action that entitles the defendant to a jury trial. Here, the District Court acknowledged that it was sitting in law as well as in equity. App. 59a.

Even the Court of Appeals did not try to characterize this as an equitable action with a penalty adjunct. In-

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[20] Historically, courts of equity had no power to impose civil penalties. Such penalties were not part of the "remedies, procedures and practices" evolving from the English Court of Chancery. *See Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 164-166 (1939).

[21] In fact, the injunctive relief provisions of the Clean Water Act, 33 U.S.C. § 1319(b), are in an entirely different subsection of the Act from the civil penalty provisions, 32 U.S.C. § 1319(d). *Cf. Warner Holding Co.*, 328 U.S. at 402.

[22] *E.g., United States* v. *Regan*, 232 U.S. at 46-47; *United States* v. *Stevenson*, 215 U.S. 190, 197-199 (1909); *Whitehead* v. *Shattuck*, 138 U.S. 146, 151 (1891).

stead, apparently recognizing that the penalties were what this case was all about, the court tried to explain its decision by saying that the Government was not suing here to "collect a penalty analogous to a remedy at law" but instead was "asking the district court to exercise statutorily conferred equitable power in determining the amount of the fine." App. 9a. This is simply inexplicable. The determination of the amount of a penalty or fine is precisely what an action at law seeks. The action does not become equitable because the *amount* of the penalty must be determined by the factfinder. Here, the Government sought penalties of up to $10,000 a day, and the court imposed penalties totaling $325,000. To treat that determination of damages as "equitable" would turn virtually every lawsuit into one without a jury.

The implications of the decision below are thus enormous. We have found, and have listed in Appendix G (App. 82a-100a), some 225 federal statutory sections that grant the Government the right to seek civil penalties or fines in varying amounts but that do not repose in an administrative agency in the first instance the right to determine, impose and collect those penalties or fines. Of these statutory sections, approximately 195 have been enacted since October 18, 1972, when the Clean Water Act became law. This represents more than a seven-fold increase in federal statutes imposing civil penalties within the last 13 years. This dramatic increase demonstrates that the jury trial issue will be a constantly recurring one and that the decision below will affect proceedings and trials far beyond the confines of the Clean Water Act.

That the issue is likely to recur is illustrated by a case which was decided subsequent to the decision below and which also dealt with the Clean Water Act. In *United States* v. *M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985), the District Court ordered the payment of $200,000 in damages to be used in restoration areas of

south Florida and a $20,000 fine after finding that the propellers of a construction company's tug boat stirred up bottom sediment which was then deposited on adjacent sea grass beds. This was held to constitute a "discharge of a pollutant" within the meaning of the Clean Water Act. The Eleventh Circuit, citing three of this Court's cases that were wholly off the mark,[23] as well as the decision in the instant case, concluded that both the Clean Water Act and the Rivers and Harbors Act were "equitable in nature," and therefore the defendant was not entitled to a jury trial. *Id.* at 1507. We have been advised by counsel for M.C.C. of Florida, Inc., that certiorari is being sought in that case.

We know that we need not argue to this Court the importance of the right to a jury, because the Court itself has emphasized that importance on a number of occasions.[24] We need only add here that to deny a jury in a case where a trial judge imposes $325,000 in fines and penalties on the ground that the action is "equitable" in nature is such a perversion of justice that this Court should not allow it to stand. Congress could have given

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[23] *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960), held that it was proper under the Rivers and Harbors Act of 1899 to enjoin the respondent companies from depositing industrial solids in a river and that they could be ordered to restore the depth of the channel by removing portions of the existing deposits. *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191 (1967), involved two admiralty cases which permitted the Government to recover the cost of removing sunken vessels. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), held that the Navy could be enjoined from discharging ordinance into waters without a permit or Presidential exemption. None of these cases involved the imposition of civil penalties or the right to trial by jury. They went no further than to impose specific equitable relief provided for by the statutes involved.

[24] *E.g.*, *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. at 501; *Jacob* v. *City of New York*, 315 U.S. 752, 753 (1942); *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935). *See also* Kirst, *Administrative Penalties and the Civil Jury: the Supreme Court's Assault on the Seventh Amendment*, 126 U. Pa. L. Rev. 1281, 1338-43 (1978).

to an administrative agency the power to impose penalties under the Clean Water Act.[25] It chose not to do so. The traditional right to jury trial, therefore, should remain intact.

2. Equitable estoppel runs against the Government and should be applied in this case.

This Court has held that the particular facts in each of a series of cases did not rise to the level necessary to work an estoppel against the Government.[26] However, the Court has left open the question of whether estoppel can run against the Government in a proper case.[27] Justice Rehnquist most recently in *Heckler* v. *Community Health Services*, 104 S.Ct. at 2228, made it clear that the majority's decision did not foreclose equitable estoppel against the Government in an appropriate case.

The Court in *Heckler* noted a number of instances in which it was held that the Government, after acting in "misleading ways," could not then enforce the law in a

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[25] See, Note, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 Colum. L. Rev. 1591, 1599 (1984).

[26] *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981); *INS* v. *Miranda*, 459 U.S. 14, 19 (1982); *Heckler* v. *Community Health Services*, 104 S. Ct. 2218 (1984).

[27] "Petitioner urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the Government. We have left the issue open in the past, and do so again today. Though the arguments the Government advances for the rule are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government." *Heckler*, 104 S. Ct. at 2224 (footnotes deleted; emphasis in the original).

harmful manner. *Id.* at 2225 nn. 12 and 13.[28] We submit that the instant case is one where, in the Government's dealings with Tull, there was not even the "minimum standard of decency, honor and reliability," referred to in *Heckler*. *See supra* n. 24. Judge Warriner's dissent sets out in detail why, under the facts of this case, equitable estoppel should be invoked. App. 13a-19a. We would simply add that what happened to Tull in this case is not fair, and in the final analysis the doctrine of equitable estoppel is a doctrine of fairness—one which must be used to ensure that justice is done.

Unfortunately, those cases in which this Court has previously dealt with the issue of equitable estoppel against the Government have been factually flawed. In *Montana* v. *Kennedy*, there was a failure to issue a passport in 1906 at a time when a passport was not required for the citizen to return to the United States. In *INS* v. *Hibi*, the failure was to publicize rights or to station an authorized naturalization representative in the Philippines. *Schweiker* v. *Hansen* involved reliance upon a claims manual which was not a regulation and therefore had no legal force to bind the Government; in fact, application of the doctrine of equitable estoppel would itself have brought about an unfair result. And in *Heckler*, equitable estoppel would have resulted in Community Health Services keeping money paid to it by mistake. The facts of the instant case are far more compelling than in any of these other situations.

The majority and the dissent in the court below saw this case in diametrically opposite ways; unfortunately, only the dissent saw the unfairness and injustice that resulted. The jurisdictional inspection requested by Tull in July of 1976 was made by the District Engineer and eight members of his staff, including two attorneys. The

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[28] Since *Heckler*, one Circuit has refused to allow dismissal of a case on the ground that the Government could not be estopped. *Reeves* v. *Guiffrida*, 756 F.2d 1141, 1144-45 (5th Cir. 1985).

majority below disregarded the fact that the precise purpose of this inspection was to make jurisdictional determinations and to determine whether permits were needed. App. 13a; JA 672, 709. The majority cited to Tull's failure to have available a development plan (App. 11a) but made no mention of the fact that at the time of the inspection Tull was in the process of filling the drainage ditch for which the District Court imposed $250,000 of the $325,000 in civil fines, so that irrespective of the existence of a development plan, the work was being done before the District Engineer's eyes. JA 568. Also ignored were compliance with the instructions received and the continued surveillance of his property for five years after the inspection. The finding that nothing the Government did or failed to do misled Tull wholly ignored the site visit, the continuing surveillance, and the correspondence between the parties. Finally, the majority did not even address the Corps' failure to issue the required Cease and Desist Order mandated by its own regulations, 33 C.F.R. § 209.120(g)(12) (1975) and 33 C.F.R. § 326.2 (1977)—a fact significant enough to be discussed by this Court in *Schweiker*, 450 U.S. at 789. The Court there pointed out that the Claims Manual relied on in that case was "not a regulation. It has no legal force, and it does not bind the SSA." *Id.* Here, however, we do have regulations. The failure of the District Engineer to issue a Cease and Desist Order mandated by his own regulations does have legal force and should bind the Corps.[29]

[29] The majority also disregarded the undisputed fact that at the time of the jurisdictional inspection by the District Engineer and his staff, Tull was filling the area immediately adjacent to Fowling Gut and the drainage ditch which emptied into Fowling Gut. Since he was not advised that this activity required a permit, it was certainly not unreasonable for him to believe that no permit was necessary when he was filling isolated low areas in the pine trees a great distance from Fowling Gut. The majority of the punishment imposed in this case, $250,000, was for filling the drainage ditch which the District Engineer observed being filled. The District Engineer did not advise Tull that a permit was required to fill that ditch, while at the same time advising him that a permit was required in another area.

We submit that the record clearly supports the dissent's view of this case, and even the majority's version raises the very issue it said it was not deciding. That is, it is clear from both versions that Tull, in good faith, *thought* he could proceed with the development of his property. JA 566. He certainly did not act in silence or in secret. It was precisely because of Tull's prior litigation with the Corps that he not only relied upon his attorney and his engineer, but he arranged the inspection to determine that his project was not within the Corps' jurisdiction and did not require a permit. JA 951-952. Regardless of how one views the Corps' inspection and what was or was not said, one thing is indisputably clear: Tull was filling the property, the filling was visible for all to see, and unless he was told otherwise, he planned to proceed. Nor is there any dispute about the Corps' general knowledge of the ongoing filling of the land, regardless of whether the Corps thereafter entered the property rather than observing it from the air. The Government experts at trial had no difficulty reviewing the same aerial photographs taken by the Corps over this period and testifying that wetlands had been filled in violation of the law. In spite of this overwhelming evidence, the majority chose to attribute no culpability to the Government. The dissent did, and the dissent was correct.[30]

We submit that this case is an appropriate one to decide the question previously left open of whether equitable estoppel runs against the Government. The Court should hold that because of the reprehensible conduct of the Government and the extent to which Tull, as Judge Warriner put it, was "lulled" into the activity for which he was then fined, the Government should have been equitably estopped from suing him.

[30] In this regard, the instant case is a far more egregious example of detrimental reliance and equitable estoppel against the Government than *Payne* v. *Block*, 751 F.2d 1191 (11th Cir. 1985), where certiorari has been granted. 54 U.S.L.W. 3223 (Oct. 2, 1985, No. 84-1948).

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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